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Supreme Court, U.S.
FILED
DEC 16 1992
OFFICE OF THE CLERK

No. 92-853

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SANDERS CONFECTIONERY PRODUCTS, INC., a Michigan corporation; JOHN M. SANDERS; FILIPP KREISSL,
Petitioners,

SAM J. MERIGIAN, on behalf of himself and all persons who were shareholders of Sanders Confectionery Products, Inc., as a Class Action Under FRCP 23(a) and 23(b),
Petitioners,

v.

HELLER FINANCIAL CORPORATION, INC., a Delaware corporation; BUTZEL, KEIDAN, SIMON, MYERS & GRAHAM, a partnership; JOHN WM. BUTLER, JR.; JAY ALIX,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT JAY ALIX IN OPPOSITION

CARSON C. GRUNEWALD
Counsel of Record
BODMAN, LONGLEY & DAHLING
100 Renaissance Center
34th Floor
Detroit, MI 48243
(313) 259-7777
Attorneys for Respondent Jay Alix

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF FOR RESPONDENT JAY ALIX IN OPPOSITION

STATEMENT OF THE CASE

In December 1987, Jay Alix was appointed Chapter 11 Trustee of Fred Sanders, Inc. ("FSI"). Petitioner Sanders Confectionery Products, Inc. ("SCPI"), was the sole holder of the common stock of FSI. Petitioners Filipp J. Kreissl and John M. Sanders were shareholders of SCPI as well as officers and directors of FSI. Peti-

tioner Sam J. Merigian was a shareholder of SCPI who died in November 1991. Petitioners did not object in the bankruptcy court to Mr. Alix's appointment nor did they seek review of the order appointing him as trustee.

In May 1988, the United States Bankruptcy Court for the Eastern District of Michigan, Southern Division, confirmed a plan of reorganization of FSI under which the assets of FSI were sold to Country Home Bakeries of Michigan, Inc., and SCPI's shareholder interest was extinguished. Petitioners did not appeal from that order of confirmation.

In February 1989, petitioners filed a Complaint in the United States District Court for the Eastern District of Michigan, Southern Division, against respondents, including Mr. Alix, seeking money damages. Petitioners made a variety of claims relating to the plan of confirmation and to matters which occurred prior to the entry of the order confirming the plan of reorganization. Petitioners' claims against Alix all related to his appointment as Trustee or to his administration of FSI's bankruptcy estate prior to entry of the order confirming the plan.

On August 8, 1990, the district court entered a Memorandum Opinion and Order which dismissed all claims against all defendants in that case because such claims arose from the same core of operative facts as FSI's bankruptcy proceedings and because, therefore, such claims were barred by the doctrine of res judicata. Petitioners SCPI, John M. Sanders and Filipp J. Kreissl appealed from that order of dismissal to the United States Court of Appeals for the Sixth Circuit as to all defendants. Petitioner Sam J. Merigian appealed only as to defendant Heller Financial, Inc. Indeed, counsel for Mr. Merigian admitted that Mr. Merigian had made no claim against Mr. Alix. (R. 96, Transcript of 7/27/90 hearing, p. 51).

On August 17, 1992, the court of appeals issued an opinion which affirmed dismissal of all claims and as to

all defendants. *Sanders Confectionery Products, Inc., et al.* v. *Heller Financial Inc., et al.*, 973 F.2d 474 (6th Cir. 1992). In that opinion, the court of appeals specifically held that all of the claims by petitioners SCPI, John M. Sanders and Filipp J. Kreissl against Mr. Alix were to be core proceedings:

> "The claims against the trustee Alix, however, would be core proceedings. . . . All claims against Alix related to his conduct during the FSI bankruptcy, and should be considered core proceedings." *Sanders Confectionery Products*, 973 F.2d 483 n. 4.

Because the Bankruptcy Court would have had jurisdiction to make a final decision on those core proceedings, the court of appeals easily concluded that petitioners' district court claims against Mr. Alix were barred by res judicata. *Id.* at 484-85.

On or about November 16, 1992, petitioners filed a Petition for Writ of Certiorari to the court of appeals. That petition does not, on its face, seek to review the decisions of the courts below regarding petitioners' claims against Mr. Alix. To the contrary, that petition suggests that petitioners do not seek review of claims against Mr. Alix. For instance:

1. Petitioners do not challenge the determination of the court of appeals that all claims against Mr. Alix are core proceedings; and

2. Petitioners' "Questions Presented" and "Reasons for Granting the Writ" relate either to non-core proceedings or to claims by Mr. Merigian (who has admitted having no claim against Mr. Alix and who did not appeal as to Mr. Alix).

Despite those facts, in a letter dated December 8, 1992 (Ex. A), counsel for petitioners indicated his belief that the Petition for Certiorari does include claims against Mr. Alix:

> "All SCPI's claims against all parties, including Alix were precluded by the defendants' assertion of

> res judicata. If the Supreme Court reverses the application of the doctrine of res judicata, all claims including those against Jay Alix were revived."

Although that assertion is totally at odds with the contents of the petition and is patently frivolous, Mr. Alix is compelled by that assertion to submit a response to Petitioners' request for a Petition for Certiorari.

SUMMARY OF THE ARGUMENT

Petitioners do not set forth any issue for this Court's review as to Respondent Jay Alix on their Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit. Petitioners' Questions Presented address claims which either expressly involve parties other than Respondent Alix or which, by the Questions' contents, address factual and legal questions having no bearing on Mr. Alix.

This Court has stated, through its Rules, that it will consider only issues actually raised in a petitioner's Questions Presented or fairly included therein. As a consequence, Petitioners have failed to ask this Court for relief as to Respondent Alix.

ARGUMENT

I. THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FAILS TO SEEK REVIEW OF ANY CLAIM AGAINST RESPONDENT ALIX AND, CONSEQUENTLY, THIS COURT MUST DENY THE PETITION AS TO JAY ALIX.

Petitioners do not set forth any reasons in their Petition why this Court should disturb the judgment below in favor of Respondent Jay Alix. In fact, the Petitioners' Questions Presented do not even raise issues relating to Mr. Alix. The Rules of this Court require, therefore that Petitioners' request for a writ of certiorari be denied as to Mr. Alix.

This Court's criteria for review of questions presented in a petition for writ of certiorari are set forth in Rule 14 of the Supreme Court Rules:

> "* * * Only the questions set forth in the petition, or fairly included therein, will be considered by the Court." Rules of the United States Supreme Court, Rule 14.1(a).

The instant Petition neither sets forth a question implicating Mr. Alix nor may such a question be "fairly included" within the text of Petitioners' Questions Presented.

Petitioners present three questions for this Court's review. They are:

> "1. Whether the Court [of Appeals for the Sixth Circuit] erred in holding the Petitioners' non-core issues that are related to the bankruptcy could be adjudicated by the Bankruptcy Court with a jury trial.
>
> "2. Whether a litigant is required to file in Bankruptcy Court and have the Bankruptcy Judge find that the claims are "non-core" and find no subject matter jurisdiction in the face of a jury demand or in the alternative may the litigant file the case directly in District Court, [sic]
>
> "3. Whether the Court [of Appeals for the Sixth Circuit] erred in holding that the Petitioner stockholders [sic] claims were not barred by res judicata or collateral estoppel and hence that the right to a jury trial is not an issue, that the stockholders failed to properly plead that the Respondent Heller was "control person" over the public stock offering thereby dismissing their case for failure to state a claim."

Petition for Writ of Certiorari at i.

Of the three questions presented thus framed, the third clearly has no relevance to Respondent Alix. This question relates solely to Petitioner Merigian's claim under Sections 12(2) of the Securities Act of 1933, 15

U.S.C. § 77*l*, and and 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j, and Section 10(b)'s accompanying Rule 10b-5, 17 C.F.R. 240.10b-5. The claims asserted under these statutes and Rule 10b-5 relate to alleged improprieties on the part of Respondent Heller Financial, which in no way implicate Jay Alix. Moreover, Mr. Merigan has conceded that he has no claims against Mr. Alix.

Equally clearly, Petitioners do not raise any issue relating to Mr. Alix in their first two Questions Presented. These questions address themselves only to the issue of the proper situs for the adjudication of "non-core" proceedings arising under the Bankruptcy Code. *See* 28 U.S.C. § 157(b)(1). Petitioners argue throughout their petition that, as to non-core proceedings, the district court deprived them of their right to a jury trial simply because of what petitioners perceive to be confusion on the part of the lower courts as to the effect of the interplay between the provisions creating the "core"/"non-core" distinction, 28 U.S.C. § 157(b)(1), and the statute establishing the original, if not exclusive, jurisdiction of the district courts in bankruptcy proceedings, 28 U.S.C. § 1334(b).

Regardless, however, of the disposition of this question, there can be no question that claims relating to Respondent Alix's duties as trustee of the bankruptcy estate of FSI are themselves core proceedings under 28 U.S.C. § 157(b)(2)(A) (stating that claims relating to the administration of the bankruptcy estate are core proceedings). Both the district court and the court of appeals, below, correctly reached this conclusion. *See, e.g., Sanders Confectionery Products*, 973 F.2d 474, 483 n.4. As core proceedings therefore, Mr. Alix's actions are not addressed in Petitioners' Questions Presented Nos. 1 & 2, which are limited in scope to non-core proceedings.

II.

As for the remaining issues addressed by Petitioners, Respondent Alix concurs in the response of Respondents Heller Financal, Inc., to be filed.

CONCLUSION

Petitioners fail to raise issues for this Court's consideration with respect to Respondent Jay Alix. Respondent Alix respectfully prays, therefore, that this Honorable Court affirm the judgment of the United States District Court for the Eastern District of Michigan with respect to Respondent Alix and dismiss the Petition for Writ of Certiorari.

CARSON C. GRUNEWALD
Counsel of Record
BODMAN, LONGLEY & DAHLING
100 Renaissance Center
34th Floor
Detroit, MI 48243
(313) 259-7777
Attorneys for Respondent
Jay Alix

APPENDIX

Richard L. Roble JD, PC
A Professional Corporation
Attorney At Law
Admitted Georgia and Michigan

The Taggart Building—1719 Abercorn St. Savannah, GA 31412
Mailing Address—P.O. Box 10033 Savannah, GA 31412-0233
Direct Phone (912) 232-7722 Fax (912) 232-1441

8 December, 1992

David Chardavoyne
Bodman, Longley & Dahling

via fax (313) 393-7579

RE: In Re Fred Sanders Inc
Sanders v Heller & Alix

Dear David:

It was nice seeing you again. Hopefully we made some steps favorable to both of us.

I was unable to address your questions regarding the cert issues because I was focused on the bankruptcy proceedings.

All SCPI's claims against all parties including Alix were precluded by the defendants' assertion of res judicata. If the Supreme Court reverses the application of the doctrine of res judicata, all claims including those against Jay Alix are revived.

Warmest regards,

Richard L. Roble

(no signature because sent directly from computer)